Supreme Court, U.S.
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CASE NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

ARTHUR ELVIN and DIANE KERRICK
Petitioners,

vs.

JON ELVIN
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

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In Propria Persona

42 pp

QUESTIONS PRESENTED FOR REVIEW

1. Is a person denied due process by only mailing of a petition/complaint when this method of service under the circumstances is not reasonably calculated to reach those who could easily be informed by other means and is not reasonably calculated to apprize interested parties of the pendency of the action and afford them an opportunity to be heard?

2. Is a person denied due process by just mailing legal process to an address where the person has never resided, been domiciled or had her place of business without utilizing due diligence to serve her by other means at hand, such as personal service or substituted service, before resorting to service by only mail?

3. Is a statute that allows for service of process by mail to an address where the person had never resided, been domiciled or had her place of business unconstitutional as

the statute does not allow for service of process that is reasonably calculated, under all of the circumstances, to apprize interested parties of the pendency of the action and afford them an opportunity to present their objections?

LIST OF PARTIES

All parties appear in the caption of the case on the cover.

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Petitioners Arthur Elvin and Diane Kerrick respectfully petition the Court to issue a writ of certiorari to the Supreme Court of the State of California in the case of Jon Elvin v. Arthur Elvin and Diane Kerrick, Civil Action No. PTR-02-283003 (October 16, 2002), and show the following:

OPINIONS BELOW

There are no official or unofficial reports of the opinions delivered in this case by other courts. Copies of the opinions of the Superior Court—Unlimited Jurisdiction, Court of Appeal and Supreme Court of the State of California are reproduced in the Appendices to this Petition.

JURISDICTION

The date of entry of the judgment of the Supreme Court of the State of California sought to be reviewed is October 16, 2002. There is no right to a rehearing or an order respecting a rehearing. The statutory provision conferring jurisdiction on this Court to review the judgement by writ of certiorari is 28 U.S.C./1257.

The United States Supreme Court will review decisions rendered by the highest court of a State in which a decision could be had. 28 U.S.C./1257. If the highest state court denies discretionary review, the United States Supreme Court has jurisdiction to review the decision of the intermediate court. Bandini Petroleum Co. v. Superior Court 284 U.S. 8, 14 (1931).

A state court judgment finally disposing of a writ petition is a final judgment reviewable under 28 U.S.C./

1257. See, Madriga v. Superior Court 346 U.S. 556 (1954). In California writ proceedings, the California Supreme Court is the highest state court available. Thus, review is proper in the United States Supreme Court. CEB, California Civil Writ Practice, (2nd edition, update 1995) //12.15-12.16, pp. 471—472.

Review of a decision concerning a judicial order made in a case pending in the Superior Court—Unlimited Jurisdiction and challenged by mandate or prohibition is by a new writ filed in the next higher court, the Court of Appeal. Heldt v. Municipal Court 163 Cal. App. 3d 532 (1985); Andrus v. Municipal Court 143 Cal. App.3d 1041, 1046 (1983).

After a decision of the Court of Appeal becomes final as to that court concerning a writ case, a party may petition the California Supreme Court for review. The petition may be filed on summary denial of a writ petition. Review of a Court of Appeal decision concerning a writ petition is by a petition for review in the California Supreme Court. CEB, California Civil Writ Practice, supra,/1071, p. 437.

Review by the California Supreme Court is not limited to a decision of the Court of Appeal on the merits. The Supreme Court can also grant review of orders summarily denying writ petitions. See, California Rules of Court, Rule 28; Eisenberg, Horovitz & Wiener, CAL. PRAC. GUIDE: CIVIL APPEALS & WRITS (The Rutter Group 1995)/13.12, p. 13—2.

If the case was summarily denied in the court of appeal, the Supreme Court can grant review and transfer to the court of appeal with directions to issue an alternative

writ. Newman v. Superior Court 179 Cal. App.3d 377, 380 (1986).

Alternatively, the state Supreme Court can grant review and issue an alternative writ returnable before the California Supreme Court, in which case a return is filed. CEB, California Civil Writ Practice (2nd edition, update 1995)/1072, p. 437—438.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

U.S. Const. Amend. XIV,/1, says at its pertinent part nor shall any State deprive any person of life, liberty, or property, without due process of law. Statutory notice under California law contravenes the requirements of the Fourteenth Amendment and Petitioners are to be deprived of property without due process of law.

The California statute at issue is California Probate Code/17203(a). California Probate Code/17203(a) fails to meet the minimum requirements of due process in that it does not provide proper notice that a proceeding has been commenced against a party and that the action will deprive a party of his property or rights.

California Probate Code/17203(a) provides for service of a petition by just mailing, and there is no requirement of due diligence to serve the person personally or by substituted service prior to service by mail:

> (a) At least 30 days before the time set for the hearing on the petition, the petitioner shall cause notice of hearing to be mailed to all of the following persons:

(1) All trustees.

(2) All beneficiaries, subject to Chapter 2 (commencing with Section 15800) of Part 3.

(3) The Attorney General, if the petition relates to a charitable trust subject to the jurisdiction of the Attorney General.

STATEMENT OF THE CASE

A. The Superior Court–Unlimited Jurisdiction Proceedings Below

On March 5, 2002, Jon Elvin filed a petition in the Superior Court-Unlimited Jurisdiction of the State of California, City and County of San Francisco, against Arthur Elvin and Diane Kerrick, Civil Action No. PTR-02-283003. The petition was accompanied by a Notice of Hearing (Probate).

Upon learning of the action, on June 19, 2002, Petitioners filed a motion to quash service of the Petition and Notice of Hearing of said action referred above. The motion to quash service included the following:

(1) Notice of Motion and Motion to Quash Petition;

(2) Memorandum of Points and Authorities In Support of Motion to Quash Service of Petition;

(3) Declaration of Respondent Diane Kerrick In Support of Motion to Quash Petition;

(4) Declaration of Respondent Arthur Elvin In Support of Motion to Quash Petition; and

(5) Request for Judicial Notice In Support of Motion to Quash Petition.

Jon Elvin filed his opposition to the Motion to Quash. The opposition included a memorandum entitled Opposition to Motion to Quash Service of Petition and a Declaration of Audrey Gerard in Support of Opposition to Motion to Quash Service of Petition.

A hearing on the Motion to Quash was held on June 26, 2002, before the Honorable John Dearman. An Order was entered by the trial court on June 27, 2002 denying the Motion to Quash Petition with no explanation as regards to the basis of its decision. On that same date, the trial court served on Petitioners the Order denying said Motion. (Appendix A)

The trial court had a clear and present legal duty to Petitioners to grant Petitioners Motion to Quash Service of the Petition and Notice of Hearing thereon. The June 27, 2002, order of the trial court is contrary to the guarantee of due process contained in the U. S. Constitution, Amend. XIV, is unreasonable, arbitrary and denies a party due process of law.

B. The Court Of Appeal Proceedings Below

On July 11, 2002, Petitioners timely filed a Petition for Writ of Mandate, Prohibition or Other Appropriate

Relief before the state First District Court of Appeal, Division Four. The federal questions to be reviewed were once again raised by Petitioners. The appellate court thereafter denied the petition without comment on August 8, 2002. (Appendix B)

C. The Proceedings Of The Supreme Court of California Below

On August 19, 2002, Petitioners timely filed and served a Petition for Review with the Supreme Court of California. The Petitioners raised the federal questions to be reviewed by this Court before the California Supreme Court. The Supreme Court of California subsequently denied the Petition for review on October 16, 2002. (Appendix C)

This Petition is timely filed and served. Petitioners raised in the court of first instance and to the highest appellate court, the federal questions sought to be reviewed. Unless the relief requested herein is granted, Petitioners will be irreparably harmed.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

A. Important Questions Of Law Which Should Be Settled By This Court

This controversy questions the constitutional sufficiency of California s statute allowing for mailing of a petition/complaint. Petitioners challenge the constitutionality of California s statute and procedures under the Due Process Clause of the Fourteenth Amendment.

Due process requires the government to give notice to individuals of government actions which would deprive those individuals of a constitutionally protected life, liberty, or property interest. When a court (even in a case where no government agency is a party) considers terminating or impairing an individual s constitutionally cognizable life, liberty, or property interest, notice must be given to the individual whose interest is at stake in the proceeding.

The form of the notice and the procedure for delivery of the notice must be reasonably designed to insure that the interested parties in fact will learn of the proposed adjudicative action. An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections. Mullane v. Central Hanover Bank & Trust Co. 339 U.S. 306 (1950).

The California statutory notice is inadequate because it is not reasonably calculated to reach those who could easily be informed by other means at hand. When notice is a person s due, process which is a mere gesture is not *due process*. Mullane v. Central Hanover Bank & Trust Co., supra.

The Superior Court issued an order that Petitioners could be served by mailing. Section 17203 of the Probate Code provides for service of a petition/complaint by mailing without any requirement of due diligence to serve the person personally or by substituted service.

Respondent failed to use any reasonable diligence to serve Petitioners personally or by substituted service at Petitioners residence, or place of business prior to serving the petition/compliant by mailing. Respondent always knew the address of Petitioner Arthur Elvin s residence yet made no effort whatsoever to serve this Petitioner at that location by personal service or substituted service.

Further, Respondent served Petitioner Diane Kerrick by mail at an address where she does not reside, is not domiciled and does not have her place of business. The address where Petitioner Diane Kerrick was served by mail has no nexus to this Petitioner as her home or place of business. The facts establish that Respondent never attempted to served Diane Kerrick personally or by substituted service. Not one inquiry was made by Respondent regarding Petitioner Diane Kerrick s place of residence or place of business and an attempt to serve her by personal service or substituted service before resorting to serving her by mail at an address where she has never resided or done business. Respondent should have been required to utilize these preferable methods of service prior to mailing of the petition/complaint.

The lower courts nevertheless without a showing of any effort to effect service by personal service or substituted service at Petitioners place of residency, or a showing of any form of attempted service at Petitioners proper place of business, allowed service by mail without any due diligence being exercised to serve the Petitioners personally or by substituted service. The requirements of due process calls for an evidentiary showing by the plaintiff that sufficient efforts to serve by one or more of the better methods (e.g. personal service, abode service, place of business service) have been utilized before a plaintiff may

resort to the drastic procedure of simply mailing the petition/complaint.

The term reasonable diligence denotes a thorough, systematic investigation and inquiry conducted in good faith by a party or his agent or attorney. Vorburg v. Vorburg 18 Cal.2d 794 (1941); Rue v. Quinn 137 Cal. 651 (1902). A number of honest attempts to learn of a defendant s whereabouts or his address by inquiry of relatives, friends and acquaintances, or of his employer, must be attempted before resorting to service by mailing. These are the likely sources of information and should be utilized before allowing service by mailing. Where the Plaintiff failed to take one step which patently appeared to hold most promise for locating a defendant, he failed to exercise that quantum of diligence as would justify resort, to service by mailing.

Also, the mandates of the legislature for service of the summons and complaint must be strictly complied with in order to obtain personal jurisdiction over a defendant. If service of process is defective, the court does not acquire jurisdiction over the defendant, and the lower courts should have granted the Petitioners motion to quash.

The Respondent should be required to meet the minimum requirements of procedural due process in order to pursue its action against Petitioners. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) .

This Court should grant review because important questions of law are involved. The petition also presents issues which regularly recur. There is a critical need for guidance to the lower state courts regarding the require-

ments of service of process in trust proceeding as the utilization of trusts has become a common method of estate planning. The decision of the California courts is contrary to established law and the decisions of this Court pertaining to the constitutional guarantee that service of process must be properly performed and be of a type which is reasonably calculated to give notice to a person in order to obtain jurisdiction over a party.

In this action Respondent seeks to impose liability on Petitioners and Petitioners are entitled to appear and defend. Jurisdiction over the Petitioners is necessary for the validity of any judgment over the person of Petitioners. Pennoyer v. Neff, 95 U.S. 714 (1877).

Personal jurisdiction over Petitioners depends upon due process, i.e., notice and opportunity for a hearing. Proper notice depends upon compliance with statutory jurisdictional requirements of process enacted by a state. But the constitutional guarantee of due process must be satisfied by (1) employing a reasonable method of notice, and (2) giving a reasonable opportunity for a hearing. Mullane v. Central Hanover Bank, 339 U.S. 360 (1950).

The requirement is of proper notice or notification, and proper notice is not satisfied by actual knowledge without such notification. Hence, even though Petitioners may have knowledge of the action, there is no jurisdiction over them unless the statutory method of notification, i.e., the type of service is sufficient. See, Rest. 2d, Judgments/2, Comment d; Rest. 2d Conflict of Laws/25, Comment f.

Under the still vital holding in Pennoyer v. Neff, 95 U.S. 714 (1877) personal service of the defendant within

the territorial jurisdiction of the state is the typical and preferred method. Substituted service is considered exceptional, and is justifiable only under special circumstances. *See*, Mullane v. Central Hanover Bank & Trust, Co., 339 U.S. 306 (1950). In accordance with the Mullane decision, service must be of the best type available under the circumstances and personal service is the primary and recognized preferred method of service. Substituted service, without even an attempt to serve the defendant with personal service, defeats the requirements under the due process clause that the service must be of the best type available. Mullane v. Central Hanover Bank & Trust, Co., *supra*.

The constitutional guarantee of due process has been denied Petitioners. The requirements of proper notice demands an attempt of personal service. In the absence of even an attempt to effect personal service over Petitioners, the California courts have no jurisdiction of the person of Petitioners. An attempt at personal service was essential to jurisdiction over Petitioners and substituted service without ever attempting personal service in the first instance violated constitutional due process. Such departure from personal service when such service is available, and resort to substituted service as in this case, must be held invalid by this Court.

B. The Present Decision Is In Conflict With Applicable Decisions Of This Court

In Mullane v. Central Hanover Bank & Trust, Co., supra, this Court said concerning protection provided by the Due Process Clause of the Fourteenth Amendment:
The statutory notice to known beneficiaries is inadequate

not because in fact it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hands.

This portion of the Mullane decision is directly opposite the decision in the present case. The decision of the Superior Court violates due process rights protected by the Fourteenth Amendment.

The U.S. Supreme Court has previously held that the state must give notice by personal service to both the owner and possessor of real property before allowing a forfeiture of one s rights, such as conducting a sale of the property for nonpayment of taxes, or a condemnation proceeding when the name of the owner is known, or easily ascertainable. Mennonite Board of Missions v. Adams 103 S. Ct 97 (1983); Schroeder v. New York 371 U.S. 208 (1962) ; Walker v. Hutchinson 352 U.S. 112 (1956) .

The decision of the Superior Court that service of process may be effected by mailing of the petition/compliant to an address where the defendant does not reside or have her place of business offends the due process rights protected by the Fourteenth Amendment. Service by mail in such circumstance is not reasonably calculated to reach those whose could be easily informed by other means at hand. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) .

In deciding whether to grant review, this Court looks to determine whether there are conflicting decisions which should be resolved in order to provide guidance to the state courts. The instant case presents an ideal vehicle for resolving the conflicting decisions with regard to an

important issue of due process.

The decisions of the California state courts is contrary to what should be firmly declared as the governing law that service of process must be of the type which is reasonably calculated to give notice to the defendant. The decisions of the state court are in conflict with the decisions of this Court that substituted service is considered exceptional and justifiable only under special circumstances in order to obtain jurisdiction over a party as a matter of due process under the Constitution of the United States. This Court should grant review and the conflicting decisions resolved as to this issue of due process.

LEGAL ARGUMENT

The trial court issued an order that Petitioners had been properly served even when the facts are undisputed that Petitioners were never personally served or served by substituted service. Service by mail was improper as no attempt to achieve service by personal service or substituted service was ever attempted. As to Petitioner DIANE KERRICK, she never received a copy of the Petition or Notice of Hearing even by mail as the papers were served at an address where she had never resided or been domiciled. Petitioners only learned of this proceeding because a copy of the Petition and Notice of Hearing was served by mail upon Petitioner ARTHUR ELVIN. Jurisdiction, however, does not come about from only knowledge of a proceeding but from proper and effective service of process. Sullivan v. Sullivan 256 Cal. App. 2nd 301 (1967).

DIANE KERRICK and ARTHUR ELVIN, individually, and on behalf of the five Trusts named in the caption

of the underlying proceeding, to wit: (1) KATRINA HOLDING TRUST, aka KATRINA HOLDINGS; (2) WILHEMINA HOLDING TRUST, aka WILHEMINA HOLDINGS; (3) BAHLUM HOLDING TRUST, aka BAHLUM HOLDINGS; (4) MORREA HOLDING TRUST, aka MORREA HOLDINGS and (5) BROWNSVILLE HOLDING TRUST, aka BROWNSVILLE HOLDINGS (collectively TRUSTS), specially appeared in the lower court for purposes of bringing their motion to quash the purported service of the PETITION TO INVALIDATE FIVE HOLDING TRUSTS or, in the alternative, FOR REMOVAL OF TRUSTEES and FOR APPOINTMENT OF PETITIONER AS SUCCESSOR TRUSTEE OF FIVE HOLDING TRUSTS ; FOR APPOINTMENT OF PETITIONER AS SUCCESSOR TRUSTEE OF THE CAROL H. ELVIN TRUST dated October 1, 1990; FOR AN ACCOUNTING; TO REDRESS BREACH OF TRUST (hereinafter Petition) and the Notice of Hearing thereon.

The efforts of the Respondent Jon Elvin for service of the Petition and Notice of Hearing thereon fell far short of the legal requirements for service of process of the Petition and, accordingly, DIANE KERRICK and ARTHUR ELVIN, individually and on behalf of the TRUSTS named in the Petition, moved to quash this defective service of process in the trial court.

First, there has been no personal service upon DIANE KERRICK, ARTHUR ELVIN or the TRUSTS. Second, there has been no valid substituted service on DIANE KERRICK, ARTHUR ELVIN or the TRUSTS. Thirdly, there has been no other kind of proper service of the Petition as authorized by California law for service of process. As established by the declarations of DIANE

KERRICK and ARTHUR ELVIN submitted to the trial court, none of the individuals named as Respondents in the Petition, DIANE KERRICK or ARTHUR ELVIN, or the separate five TRUSTS, named in the caption of the underlying proceeding, have been properly served or provided proper notice of the Petition. The motion to quash should have been granted by the trial court.

A challenge to personal jurisdiction constitutes a special appearance and may be based on improper service of process. The improper service of process may be a defect in the method of service. Stamps v. Superior Court 14 Cal. App. 3d 108 (1971). A motion to quash may also be made by failure to serve the Petition and summons altogether. Wilson v. Eddy 2 Cal. App. 3d 613 (1969).

In the underlying proceeding, there was a failure to serve the Petition altogether or the Petition was not properly served on any of the Petitioners. As set forth in the declarations of DIANE KERRICK and ARTHUR ELVIN submitted to the trial court in support of the motion to quash, Respondent Jon Elvin failed to effect proper service of the Petition on each of the Petitioners.

With regard to service or mailing of the Petition and Notice of Hearing to DIANE KERRICK, her declaration in support of the motion to quash establishes that she never even received a copy of the Petition, accompanying papers and Notice of Hearing by any manner for service of process of a summons, i.e. personal service, substituted service, etc. Indeed, there has never been an attempt to provide notice of the underlying proceeding to DIANE KERRICK even by regular mail at her place of residence. There has been a total failure on behalf of Respondent Jon Elvin to attempt to effect service of process upon DIANE

KERRICK in any of the required manners for service of process or even providing notice by regular mail of the Petition at her place of residence.

As the declaration of DIANE KERRICK sets forth, she was never personally served, served by substituted service or served in any of the other manners for service of process. The declaration of DIANE KERRICK also states that she has never even received a copy of the Petition at her place of residence by regular mail:

> 7. *There was never mailed to me and I never received by mail a copy of (1) PETITION* . . . . (2) DECLARATION OF JON ELVIN IN SUPPORT OF PETITION or (3) *NOTICE OF HEARING.*
>
> 9. *I have never received by any manner for proper service of process or notice of process a copy of (1) PETITION* . . . . (2) DECLARATION OF JON ELVIN IN SUPPORT OF PETITION or (3) *NOTICE OF HEARING.*
>
> (Emphasis added, Declaration of DIANE KERRICK submitted in support of motion to quash, paragraphs 7 & 9.)

DIANE KERRICK only learned of this proceeding as a result of attorney John G. Hanlin receiving in the mail in care of DIANE KERRICK a copy of the Petition and then notifying Petitioner Arthur Elvin of said service. DIANE KERRICK never authorized John G. Hanlin to receive service of process *by mail* on her behalf as an individual or in any other capacity. *See*, Declaration of DIANE KERRICK in Support of Motion to Quash, para.

2.) The motion to quash should be granted as to Petitioner DIANE KERRICK as she was never properly served in any manner, including even by mail, with the Petition and Notice of Hearing.

Similarly, there has been lack of service of process or improper service of the Petition upon Petitioner ARTHUR ELVIN. The Petition was apparently mailed only to ARTHUR ELVIN. However, this attempted service of the Petition woefully fails for service of process because ARTHUR ELVIN is only named as an individual in the Petition. However, ARTHUR ELVIN is actually being sued in this proceeding *in his capacity as Trustee of the five holding TRUSTS named in the proceeding* as the claims set forth in the Petition arise out of ARTHUR ELVIN s capacity as a Trustee. *(See*, Declaration of ARTHUR ELVIN In Support of Motion to Quash Petition, para. 8.)

No personal service, substituted service or service of any kind of the Petition was ever attempted upon ARTHUR ELVIN individually or in his capacity as Trustee of the five holding TRUSTS named herein. Based on the allegations of the Petition, ARTHUR ELVIN must be served in his individual capacity and as the Trustee of the five TRUSTS. *(See,* Declaration of ARTHUR ELVIN In Support of Motion to Quash Petition, para. 8.)

Section 17203(a) of the Probate Code simply provides for mailing of the petition and, therefore, the California statute fails to meet the minimum requirements of due process in that it does not provide proper notice that a proceeding has been commenced against a party and that the action will deprive a party of his property and/or rights. In this case, the petition and notice of hearing was

mailed to Diane Kerrick at an address where she does not reside, is not domiciled and does not have her place of business.
Petitioner Arthur Elvin also was not served with process most reasonably calculated to provide notice and an opportunity to be heard.

In a significant reversal from the usual motion procedure, the moving party on a motion to quash service does not have the burden of establishing lack of personal jurisdiction. Rather, it is the plaintiff or petitioner in opposing the motion who has the burden of establishing the existence of jurisdiction by a preponderance of the evidence. Magnecomp Corp. v. Athene Co. 209 Cal. App. 3d 526 (1989) .

Respondent Jon Elvin did not effect proper personal service or substituted service on any of the Petitioners. Respondent did not even attempt to effect personal service on ARTHUR ELVIN at his dwelling house or usual place of abode and Respondent did not comply with the statutory requirements for substituted service on the five individual TRUSTS named herein, or on behalf of ARTHUR ELVIN or DIANE KERRICK. Each of the individual TRUSTS is a separate business entity entitled to proper service of process. Respondent failed to use reasonable diligence since personal service on the Petitioners was never utilized. Respondent failed to effect proper service on any of the persons entitled to notice and service of the Petition.

It is established case law that actual notice of the proceeding does not cure the defects of failure to serve or improper service. The statutory requirement for service of a petition must be strictly complied with in order to obtain

personal jurisdiction over the Petitioners. Jurisdiction does not result from mere knowledge of the proceeding but from proper service of process. Independent Bankers Trust Co. v. Superior Court 138 Cal. App. 3d 238 (1982); Sullivan v. Sullivan 256 Cal. App. 2d 301 (1967); Pousson v. Superior Court 165 Cal. App. 2d 750 (1958).

In Sternbeck v. Buck 148 Cal. App. 2d 829 (1957) the process server handed the papers to Sternbeck s wife while Sternbeck was standing less than 100 yards away. The court ruled that the papers were not served according to the requirements of the Code of Civil Procedure. Whether or not the defendant receives the summons and complaint thro gh some other means than lawful service is irrelevant.

Since mere knowledge of a proceeding does not confer jurisdiction, this court should grant the motion to quash on behalf of each of the Petitioners. The right to lawful service as prerequisite for any action or proceeding has been upheld by numerous California court decisions. Respondent should be required to meet the minimum requirement of the Probate Code and the Code of Civil Procedure in order to pursue his action against the Petitioners.. See Evartt v. Superior Court 89 Cal. App. 3d 795 (1979). The failure of Respondent to abide by the Probate Code and the Code of Civil Procedure is evident from the declarations submitted in support of the motion to quash. Since there has been improper service, the state courts lack jurisdiction over the Petitioners.

Since there was a failure to effect proper service, the lower courts abused their discretion in failing to grant Petitioners motion to quash. Accordingly, the lower courts decisions denying Petitioners motion to quash must be reversed.

The framers of the Constitution intended that its principles would apply equally throughout the nation. James Madison in presenting to the first Congress a Bill of Rights, which included the Due Process Clause of the Fifth Amendment, assigned as one of the principal purposes of his amendments obtaining an equality of those rights for persons in all of the states. 1 Annals of Cong. 439 (Joseph Gales ed., 1789). The proponents of the Fourteenth Amendment recognized that its Due Process Clause was taken from the Fifth Amendment and presented as one of its purposes that all shall be protected alike in life, liberty and property. Remarks of Senator Jacob Howard, Cong. Globe, 39th Cong., 1st Sess. 1089 (1866).

Under the present conflict among the decisions of this Court and the Supreme Court of California, constitutional rights are not being protected alike for all persons in the several states. Rather those rights depend upon the location of residence and the state setting the controlling precedent for the state in which the person resides. Unequal application of the constitution can only engender disrespect for the rule of law and the judicial process.

A primary function of the Supreme Court, as envisioned by the founders of the republic, was as a superintending power to secure uniformity in the exposition of the Constitution, laws and treaties of the United States. Remarks of James Madison as reprinted in 3 Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 532 (1836), (hereafter, Elliot, Debates) and remarks of Edmund Pendleton, president of the Convention of the Commonwealth of Virginia, on the adoption of the federal constitution, reprinted at 3 Elliot, Debates 518—19. James Iredell, speaking at the North Carolina convention, observed:

> The propriety of having a Supreme Court in every government must be obvious to every man of reflection. There can be no other way of securing the administration of justice uniformly in the several states. There might be, otherwise, as many different adjudications on the same subject as there are states. 4, Elliot, Debates 147.

The California statutory notice is inadequate because the notice is not reasonably calculated to reach those who could easily be informed by other means at hand. When notice is a person s due, process which is a mere gesture is not *due process*. Mullane v. Central Hanover Bank & Trust Co., *supra*.

The Respondent should be required to meet the minimum requirements of procedural due process in order to pursue his action against Petitioners. Mullane v. Central Hanover Bank & Trust Co., *supra*.

CONCLUSION

For all of the reasons set forth herein, review and relief should now be granted in order to address the important questions presented. In order to obtain uniformity in the construction of the constitution and to obtain equality for persons in the several states in the rights and protections secured by the constitution, Petitioners pray that this Court issue its writ of certiorari and accept jurisdiction over this case.

October 25, 2002

Respectfully submitted,
Arthur Elvin
Diane Kerrick
P. O. Box 2469
San Francisco, CA 94126
Telephone: (415) 999-6022
Petitioners
In Propria Persona

APPENDICES

FILED
JULY 27, 2002

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN FRANCISCO

In Re	) No. SPR-073181
	)
THE CAROL H. ELVIN TRUST dated October 1, 1990; KATRINA HOLDING TRUST, aka KATRINA HOLDINGS; WILHELMINA HOLDING TRUST, aka WILHELMINA HOLDINGS; BAHLUM HOLDING TRUST, aka BAHLUM HOLDINGS; MORREA HOLDING TRUST, aka MORREA HOLDINGS; AND BROWNSVILLE HOLDING TRUST, aka BROWNSVILL HOLDINGS,	) **SPECIAL APPEARANCE**
	)
	) ORDER DENYING MOTION TO QUASH PETITION TO INVALIDATE FIVE HOLDING TRUST or, in the alternative, FOR REMOVAL OF TRUSTEES and FOR APPOINTMENT OF PETITIONER AS SUCCESSOR TRUSTEE OF FIVE HOLDING TRUSTS ; FOR APPOINTMENT OF PETITIONER AS SUCCESSOR TRUSTEE OF THE CAROL H. ELVIN TRUST dated October 1, 1990; FOR AN ACCOUNTING; TO REDRESS BREACH OF TRUST
JON W. ELVIN, Petitioner, vs. ARTHUR ELVIN, and DIANE KERRICK, Respondents.	) Date: June 10, 2002 Time: 9:00 a.m. Dept.: Probate, Room 204
	) Petition filed: March 5, 2002

The Motion to Quash Petition to Invalidate Five Holding Trusts or, in the alternative, for Removal of Trustees and for Appointment of Petitioner as Successor Trustee of Five Holding Trusts ; for Appointment of Petitioner as Successor Trustee of the Carol H. Elvin Trust dated October 1, 1990; for an Accounting; to Redress Breach of Trust came on for a continued hearing on June 26, 2002.

Audrey Gerard, Attorney at Law, appeared on behalf of Jon W. Elvin, Petitioner, and John G. Hanlin, Attorney for Specially Appearing Respondent Arthur Elvin, appeared on behalf of Arthur Elvin and Diane Kerrick, Respondents.

GOOD CAUSE APPEARING THEREFORE,

The Court HEREBY denies the Motion to Quash Petition to Invalidate Five Holding Trusts or, in the alternative, for Removal of Trustees and for Appointment

of Petitioner as Successor Trustee of Five Holding Trusts ; for Appointment of Petitioner as Successor Trustee of the Carol H. Elvin Trust dated October 1, 1990; for an Accounting; to Redress Breach of Trust.

The Petition to Invalidate Five Holding Trusts or, in the alternative, for Removal of Trustees and for Appointment of Petitioner as Successor Trustee of Five Holding Trusts ; for Appointment of Petitioner as Successor Trustee of the Carol H. Elvin Trust dated October 1, 1990; for an Accounting; to Redress Breach of Trust, is hereby set for a hearing on July 31, 2002, at 9:00 a.m., in the Probate Department, Room 204, 400 McAllister Street, San Francisco, California.

DATED: June 27, 2002

/S./ JOHN DEARMAN
JOHN DEARMAN
Judge of the Superior Court

APPENDIX A

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

FILED
AUG 08, 2002

ARTHUR ELVIN, ET AL.

Petitioners,

v.

SUPERIOR COURT OF SAN FRANCISCO COUNTY,

Respondent;

JON W. ELVIN,

Real Party in Interest.

A099399

(San Francisco County Super. Ct. No. PTR-02-283003)

BY THE COURT:

The petition for writ of mandate is denied.

(Kay, P.J., Reardon, J. And Sepulveda, J. joined in the decision.)

Date: **AUG 08 2002**

/S./ KAY, P.J. P.J.

APPENDIX B

Court of Appeal, First Appellate District, Division Four - No. A099399

S109297

IN THE SUPREME COURT OF CALIFORNIA

En Banc

ARTHUR ELVIN, Petitioners,

v.

SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO,
Respondent;

JON W. ELVIN, Real Party in Interest.

Petition for review DENIED.

FILED
OCT 16 2002

/S./ GEORGE, C.J.
Chief Justice

APPENDIX C